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Mines and Minerals--Coal Mining Rights--Waiver of Subjacent Support

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MINES AND MINERALS—COAL MINING RIGHTS—WAIVER OF SUBJACENT SUPPORT.—*P's* sued to recover for injuries to the surface of their land caused by *D*'s failure, in mining and removing coal, to provide adequate support for the surface. The deed of severance granted *all* the coal together with the rights of mining and removing *said* coal. *D* contended that the mining rights conveyed by the deed permitted the removal of all the coal free from any obligation to provide support for the surface. A demurrer to the declaration was sustained by the trial court which, on its own motion, certified its ruling to the Supreme Court of Appeals. *Held,* reversed. The severance deed did not divest the surface owners of their right of subjacent support. *Winnings v. Wilpen Coal Co.,* 59 S.E.2d 655 (W. Va. 1950). See also *Erwin v. Bethlehem Steel Corp.,* 62 S.E.2d 337 (W. Va. 1950), wherein the same construction was placed upon severance deeds practically identical with the one construed in the principal case.

In the case of *Griffin v. Fairmont Coal Co.,* 59 W. Va. 480, 53 S.E. 24 (1905), it was held that the owner of the surface of a tract of land had relinquished his right of subjacent support because he had sold *all* his coal together with the right to remove *all* of the coal. The court said there was a vast difference between a grant of the coal simply and a grant of the coal together with the right to remove all of it. In the principal case the severance deed granted *all* the coal together with the right to remove the *said* coal. Compare this with the deed in the *Griffin* case. The words used are the same in both deeds except that in the principal case the word "said" is used in the mining clause instead of the word "all". The deed in the *Griffin* case was held to be unambiguous. *Id.* at 495, 516, 53 S.E. at 30, 38. In the principal case the court said: "The rule of the Griffin case is based upon the use of the word 'all' in connection with the mining rights conveyed, and the failure to use, in the mining clause, the word 'all' or its necessary, unqualified, or exact counterpart or equivalent renders the rule inapplicable in any particular instance. Here the words 'said coal' can not be said to be the exact or complete equivalent of 'all the coal', even though the words 'said coal' refer generally to the conveyance of all the coal." At 661. It seems that the words "said coal" can refer to nothing else but "all the coal", there being no other antecedent to which it could apply. Would not therefore the words apply specifically, rather than "generally", as was said by the court, to their only antecedent "all the coal"?

The court admits that the words "said coal" refer to the grant of all the coal but says that these words "do not necessarily mean all the coal; they may mean as much of the coal conveyed as can be removed without injury to the surface." At 661. Following this line of reasoning, could not the same argument apply where, as in the *Griffin* case, the word "all" was used? Here the word "said" could mean nothing else but its only antecedent "all". *Cf. Hodge v. Garten,* 116 W. Va. 564, 182 S.E. 582 (1935), wherein the word "all" was said to mean less than all.

If the words "said coal" do not refer to and intend "all the coal", would not the mining clause of the deed have read only "the coal", thus dispensing with the use of the word "said"? The decisions are numerous in which the courts have construed and interpreted the word "said". See 38 W. & P. (Perm.) 25 *et seq.* In no case found has it been held to have no meaning. The West Virginia court has held that "in the construction of a deed, effect must be given to every part and *every word* therein contained if possible to do so." *Griffin v. Coal Co., supra* at 494, 53 S.E. at 30. Italics supplied. See also *Stephenson v. Kuntz,* 131 W. Va. 599, 49 S.E.2d 235 (1948) and the numerous cases there cited.

It would seem therefore that the severance deed was not rendered ambiguous merely by using the word "said". Considering the deed as a whole and taking the words used therein in the manner in which they are generally understood and received, they can have only one meaning. *Stephenson v. Kuntz, supra; Mills v. Edgell,* 69 W. Va. 421, 71 S.E. 574 (1911); *Williams v. South Penn Oil Co.,* 52 W. Va. 181, 43 S.E. 214 (1902). Therefore, there is no room for construction; the writing must speak for itself. *Bruen x. Thaxton,* 126 W. Va. 330, 28 S.E.2d 59 (1943); *Griffin v. Coal Co., supra; Uhl v. Ohio River R.R.,* 51 W. Va. 106, 41 S.E. 340 (1902).

If, however, there were a doubt as to whether the deed was ambiguous, then the rule that the deed must be construed most strongly against the grantor would be applicable. " 'Where the grant shows the intention, *even though ambiguously stated,* following the rule that it is construed most strongly against the grantor, the right to surface support will be held *not* to exist.' ". *Griffin v. Coal Co., supra* at 516, 53 S.E. at 38. Italics supplied. See also *Swope v. Pageton Pocahontas Coal Co.,* 129 W. Va. 813, 41 S.E.2d 691 (1947); *Weekley v. Weekley,* 126 W. Va. 90, 27 S.E.2d 591 (1943).

If the mining clause by the use of the words "said coal" does not refer to and mean all the coal, why then was a mining clause inserted in the deed? Indeed, the effect of the construction placed on the mining clause in the principal case renders it useless and redundant, mere surplusage. A grant merely of "the coal" in a severance deed containing no mining clause whatsoever would give the grantee, as an incident to the ownership of the coal, "the right to use the surface in such manner and with such means as would be fairly necessary to the enjoyment of the mineral estate", *Squires v. Lafferty,* 95 W. Va. 307, 121 S.E. 90 (1924), in other words, all the rights and privileges to mine and remove the coal that the grantees were said to have received in the principal case. Thus, the court now holds that the same legal effect is to be given to, the same expression of intention manifests itself from, each of the following grants: (1) *A* grants to *B* the coal under Blackacre, and (2) *A* grants to *B* all the coal under Blackacre together with the right to enter upon and under the land to mine and remove said coal. But, if *A* grants to *B* all the coal under Blackacre together with the right to enter upon and under the land to mine and remove *all* the coal, there is evidenced an intention to waive the right of subjacent support.

The principal case, therefore, even if it is not a departure from the rule laid down in the *Griffin* case, indicates convincingly that the court intends to limit this rule to the particular facts of that case. Rightly or wrongly, the court, in this instance, leaves no room for the application of accepted rules regarding the construction and meaning of written instruments. In its place, in this instance, it will now apply a rigid and artificial rule of thumb, to wit: Only the word "all" or its exact equivalent when used in the mining clause of a severance deed evinces the intention necessary to indicate a waiver of the right of subjacent support.

W. E. C.

SALES—BULK SALES ACT—LESSOR NOT CREDITOR AS TO FUTURE RENT.—*P* leased premises to *F,* who operated a hardware store thereon, for two years. The lease provided for a fixed gross rental payable in monthly installments. Five months after the lease was executed *F* sold his entire stock to *D. F,* having paid his current monthly rent, and neither *F* nor *D* considering *P* as a creditor, they failed to include *P* in the list of *F*'s creditors given notice in the